

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

2:55:13 PM 12/21

68761

In the Matter of :
: AMERICAN SOCIETY OF TRAVEL AGENTS, INC. :
: and :
: JOSEPH L. GALLOWAY, :
: Complainants, :
: v. :
: UNITED AIRLINES, INC., et al., :
: Respondents. :
:

Docket OST-99-6410-13

ANSWER OF MIDWEST EXPRESS AIRLINES, INC.

Communications with respect to this document may be served upon:

Carol Skornicka, Esq.
Senior Vice President —
Corporate Development,
Secretary and General Counsel
MIDWEST EXPRESS AIRLINES, INC.
6744 South Howell Avenue
Oak Creek, Wisconsin 53154

Robert P. Silverberg
SILVERBERG, GOLDMAN &
BIKOFF, L.L.P.
1101 30th Street, N.W.
Suite 120
Washington, D.C. 20007
(202) 944-3300

Attorneys for
MIDWEST EXPRESS AIRLINES, INC.

Dated: December 10, 1999

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

| | | |
|---|---|--------------------|
| In the Matter of | : | |
| AMERICAN SOCIETY OF TRAVEL AGENTS, INC. | : | |
| and | : | |
| JOSEPH L. GALLOWAY, | : | |
| Complainants, | : | Docket OST-99-6410 |
| v. | : | |
| UNITED AIRLINES, INC., et al., | : | |
| Respondents. | : | |

ANSWER OF MIDWEST EXPRESS AIRLINES, INC.

Pursuant to Rule 204(b) of the Department of Transportation ("DOT") Rules of Practice, Midwest Express Airlines, Inc. ("Midwest Express") hereby answers the Complaint of the American Society of Travel Agents, Inc. and Joseph L. Galloway (collectively, "ASTA") alleging violations of 49 U.S.C. § 41712.^{1/} For the reasons discussed infra, Midwest Express denies all of the allegations in the Complaint and respectfully requests that the Complaint be dismissed in its entirety.

I. Introduction.

In its Complaint, ASTA alleges that Midwest Express and sixteen other domestic and international air carriers have, through their recent unilateral decisions to reduce commission levels paid

^{1/} On November 2, 1999, prior to the original due date for Answers, Samuel Podberesky, Esq., Assistant General Counsel for Aviation Enforcement and Proceedings, granted all Respondents until December 10, 1999 to timely file their Answers.

to travel agents, committed "unfair practices and unfair methods of competition in air transportation and the sale of air transportation" in violation of 49 U.S.C. § 41712. See ASTA Complaint ("Complaint") at 11, 24. In relief, ASTA requests that the Department order the named airlines to "cease and desist immediately" from continuing this practice. Id. at 24.

Midwest Express respectfully submits that, as the following discussion of the law and analysis of the allegedly "unfair practices and methods of competition" clearly reveal, ASTA has utterly failed to present evidence or argument establishing a prima facie violation of § 41712.

II. The Law Governing Competition And Commissions.

This Department and its predecessor, the Civil Aeronautics Board ("C.A.B."), have, since the earliest days of deregulation, repeatedly determined that the commissions paid to travel agents by airlines should be subject to market forces. See, e.g., Order 79-9-65 at 3 (in discussing travel agent commissions, the C.A.B. noted that ". . . the public interest demands even greater reliance on the free interplay of actual and potential competitive forces."); Order 80-12-11 at 6 (" . . . experimentation and nonuniformity of commission rates would seem to be an inevitable and desirable result of the deregulation of the transportation industry."); Order 82-12-85 at 6 ("we think that the [ticket] distribution system that evolves should be determined by the marketplace."); Order 83-3-127, ("We conclude that the only assurance that commission payments are reasonable can come from the operation of the unfettered market

place."). Accordingly, it is well-established that the best and most efficient arbiter of the commission rates travel agents may collect is the free, unrestricted market. Nothing in the ASTA Complaint suggests any reason why the Department should disturb its long-established policy deregulating travel agent commission rates.

Apart from the fact that ASTA has no policy basis for its Complaint, the statute on which it has relied is of no aid to the Complainants in the context of the facts of this matter. 49 U.S.C. § 41712, prohibits, inter alia, "an air carrier, foreign air carrier, or ticket agent" from engaging in "an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." While this statute clearly is intended to prevent "unfair" and "deceptive" practices and methods of competition, it is also, as ASTA correctly points out, designed to protect consumers. See, e.g., Complaint at 5-7 (citing, inter alia, Pan American World Airways, Inc. v. United States, 371 U.S. 296, 308 (1963), wherein the Supreme Court noted that the immediate predecessor of § 41712, § 411 of the Civil Aeronautics Act, was designed to promote ". . . adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices . . .").

However, it is also well-established that 49 U.S.C. § 41712 is intended to protect competition, not competitors. See, e.g., Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301 ("The section is concerned not with punishment of wrongdoing or protection of

injured competitors, but rather with protection of the public interest.").

Accordingly, in order to succeed on its claims, ASTA must present a prima facie case not simply that the agents it represents have been injured in some fashion, but that Midwest Express and the other Respondents have engaged in practices that are "unfair" or "deceptive" and that those practices have caused "substantial" harm to air travel consumers. As discussed infra, ASTA has made no such showing.

III. ASTA's Claims.

The overarching complaint ASTA levels against Midwest Express and the other Respondents is that the recent reduction in travel agent commissions will reduce competition among airlines and ultimately raise air transportation prices for consumers? Midwest Express respectfully submits that, for the reasons discussed infra,

^{2/} The theory underlying ASTA's claim appears to unfold as follows: the reductions will force a significant number of travel agents out of business, and if a significant number of travel agents are forced out of business, two things are likely to happen: (1) consumers will have less unbiased information about the airlines and will thus often end up paying more for air travel than they would if they had the advice of travel agents; and (2) new entrant air carriers will be deprived of access to consumers and will not be able to enter the air transportation market, thus reducing potential competition and increasing fares charged to consumers. Notably, however, ASTA provides no authority — either legal or economic — to support this theory. ASTA does, however, concede that the Internet has emerged as a popular new distribution channel for air transportation. Complaint at 10. Given this, even if there were fewer travel agents in the future (a proposition that has not been established by ASTA) because of lower commission rates, the opportunities for purchasing air transportation will hardly be diminished as the Internet penetrates deeper into consumers' daily lives.

ASTA's complaint fails to state a prima facie claim of a violation of 49 U.S.C. § 41712.^{3/}

As a threshold matter, 49 U.S.C. § 41712 clearly states that a given practice must be "deceptive" or "unfair" for it to be prohibited by that statute.'" ASTA's Complaint in this case is utterly bereft of any credible allegations — let alone evidence — to support a finding that Midwest Express or the other Respondents acted in a "deceptive" or "unfair" manner in reducing the commissions paid to travel agents or that consumers have in any way been harmed by those reductions.

ASTA has not alleged any of the "hallmark" signs traditionally indicative of deceptive or unfair competitive practices. For instance, ASTA has made no allegation that Midwest Express "colluded" with the other airlines or acted anything other than unilaterally when it reduced the commissions it pays to travel agents. Similarly, ASTA has made no credible allegation that the

^{3/} Midwest Express does not deny that it has reduced commissions as ASTA alleges; Midwest Express categorically denies, however, that such reductions violated any law.

^{4/} The statute also prohibits "unfair methods of competition," but travel agents are not "competitors" of airlines. See, e.g., Order 99-4-19 at 6 (dismissing § 41712 complaint of travel agent group against airlines because, inter alia, complainant failed to refute the argument that travel agents do not "compete" with airlines for purposes of § 41712); Order 95-1-2 at 5 (refusing to institute a formal proceeding under § 41712 concerning an airline's imposition of restrictions on tickets sold by travel agency that it did not impose upon tickets it sold itself because complainant failed to demonstrate that such action was "unreasonable" or would "adversely affect competition in the airline industry in any substantial way").

reductions were effected with "predatory" intent.^{5/} Indeed, ASTA has not even alleged that Midwest Express and the other airlines breached any contract with the travel agents."

The simple fact is, Midwest Express' actions in reducing commissions were nothing more than an attempt by Midwest Express to "stay competitive" in a highly competitive industry. The costs associated with the distribution of airline tickets, which costs include commissions paid to travel agents, are one of the highest costs faced by airlines today, and Midwest Express' attempt to lower these costs is — just as an attempt to lower fuel costs would be — an eminently reasonable, logical and justifiable attempt to remain competitive in a highly competitive market. Absent a credible allegation of collusion or predatory intent, there is simply no ground for assuming that these otherwise pro-competitive actions were "deceptive" or "unfair."

With regard to "evidence" of prohibited activity, the only evidence ASTA produces to support its theory that the recent reductions in commissions paid to travel agents constitutes an

^{5/} The best the Complaint has to offer in terms of allegations of "predatory intent" are the statements that the airlines' "anti-competitive strategy is likely designed to" put travel agents out of business and that the reduction in commissions "reflects . . . [a] naked exclusionary intent." Complaint at 20, 23. "Likely designed to" and "reflects an intent" barely suffice to allege predatory intent, let alone establish such intent.

^{6/} The agreements and conventions between the airlines and the travel agents give the airlines the right to alter the commission structure at will. To the extent ASTA's claim of "unfair competition" seems forced, it is because ASTA's claim is in reality not an unfair competition claim, but a contract claim. Even ASTA, however, was not prepared to allege that any carrier is in breach of its travel agent agreement regarding commission levels.

unfair practice is the alleged detrimental effect the commission "caps" instituted by the airlines several years ago have had on the travel agent industry. See Complaint at 11 (wherein ASTA claims that the commission caps have been "a major factor in the exit of 12 percent of independent U.S. travel agencies from the industry during 1995-98 . . ."). ASTA presents no evidence, however, that the commission caps — or the more recent reduction of commissions — have harmed consumers in any way.^{2/}

Given the clear policy the Department has established for allowing market forces to set commission rates, and given the dearth of allegations — let alone evidence — to support a finding that the reduction in commissions was an "unfair" or "deceptive" practice or has harmed consumers in any way, Midwest Express and the other Respondents cannot be held liable for a violation of 49 U.S.C. § 41712.

Finally, in addition to the reduction in commission levels paid to travel agents, ASTA also asserts a litany of other practices that it alleges are unfair and hinder competition. Complaint at 12-19. As with the reduction in commissions, however, none of the alleged practices amounts to a violation of 49 U.S.C. § 41712 (indeed, several of them have been approved by the

^{2/} ASTA has provided no authority — legal or economic — to support its proposition that a loss of travel agents necessarily causes harm to the travel consuming public. Moreover, ASTA provides no evidence that would-be new entrant airlines have failed to materialize because they lack a means of distributing tickets. A computer, a web page, and a server are all that any new entrant would need to reach the increasingly greater number of "wired" consumers.

Department, and at least one of them is no longer even occurring&'). Accordingly, Midwest Express denies any violation of law with respect to any of those practices and asks that, to the extent any of those practices is intended to be a claim separate and apart from the reduction in commissions claim, it be denied."

IV. Conclusion.

As the foregoing analysis demonstrates, ASTA has utterly failed to state a prima facie claim against Midwest Express for violations of 49 U.S.C. § 41712.^{10/} Midwest Express unilaterally reduced its commissions — as it is clearly allowed by contract to do — to stay competitive with other airlines, not to put anyone out of business. ASTA has made no allegations — let alone provided any evidence — to support a finding of "unfair" or "deceptive"

^{8/} See in particular the ASTA complaints regarding SATO, which ASTA concedes the airlines no longer even own. Complaint at 17-18.

^{2/} Although ASTA sets out these practices in ten numbered paragraphs, its Complaint clearly centers on the reduction of commissions. Given the fact that the only relief ASTA has requested is for the Department to order Respondents to "undue" that reduction (Complaint at 24), ASTA is not entitled to relief on any of the other ostensible "claims."

^{10/} With the exception of the ten numbered paragraphs detailing the practices for which ASTA does not seek relief, ASTA's Complaint does not follow the usual "numbered paragraph" form; the allegations concerning the sole claim for which ASTA seeks relief — the reduction in commissions — are scatter-shot throughout the Complaint. Accordingly, Midwest Express cannot plead directly in response to each of the allegations concerning the reduction in commissions. To the extent not already stated, Midwest Express hereby formally admits that it reduced travel agent commissions from 8% to 5%, but expressly denies that that reduction — or any of the other alleged practices (none of which are mentioned in ASTA's prayer for relief) — violated any law, regulation or policy.

practices on the part of Midwest Express or the other airlines, nor has ASTA provided any evidence or authority to support its theory that a slight reduction in the number of travel agents will surely result in economic harm to the traveling public. Given these fatal shortcomings, and given this Department's well-established policy to allow market forces to dictate travel agent commissions, Midwest Express respectfully requests that ASTA's Complaint be dismissed in its entirety and that the Department take no further action with respect to the ASTA complaint.

Respectfully submitted,

SILVERBERG, GOLDMAN & BIKOFF, L.L.P.

Attorneys for
MIDWEST EXPRESS AIRLINES, INC.

By: 

Robert P. Silverberg

Dated: December 10, 1999

CERTIFICATE OF SERVICE

I hereby certify that the persons on the attached list were served by first-class mail, postage prepaid, with Midwest Express' Answer this 10th day of December, 1999.


Robert P. Silverberg

SERVICE LIST

Paul M. Ruden
Burton J. Rubin
American Society of Travel
Agents, Inc.
1101 King Street
Alexandria, VA 22314

Anita M. Mosner
Steven Y. Quan
GKMG Consulting Service, Inc.
1054 31st Street, N.W.
Washington, D.C. 20007
(for Air Canada)

Geoffrey Pratt
Air Canada Centre
7373 Cote Vertu Boulevard West
Saint-Laurent, Quebec, Canada

Michael F. Goldman
Silverberg, Goldman & Bikoff, LLP
1101 30th Street, N.W.
Suite 120
Washington, D.C. 20007
(for Air France)

Marshall Sinick
Squire, Sanders & Dempsey
120-1 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20004
(for Alaska Airlines & Horizon
Air Industries)

John E. Gillick
Winthrop, Stimson, Putnam &
Roberts
1133 Connecticut Ave., N.W.
Washington, D.C. 20036
(for America West)

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Brian T. Hunt
General Counsel
P.O. Box 51609
Indianapolis Int'l Airport
Indianapolis, IN 46251
(for American Trans Air)

William G. Doherty
7337 W. Washington Street
Indianapolis, IN 46251-0609
(for American Trans Air)

R. Bruce Keiner
Crowell & Moring, L.L.P.
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(for Continental Airlines)

Robert E. Cohn
Shaw, Pittman
2300 N Street, N.W.
Washington, D.C. 20037
(for Delta Air Lines)

Paul V. Mifsud
Vice President, Government &
Legal Affairs-USA
KLM Royal Duty Airlines
2501 M Street, N.W.
Washington, D.C. 20037

Elliott M. Seiden
David G. Mishkin
Northwest Airlines, Inc.
Suite 310
901 15th St., N.W.
Washington, D.C. 20005

Robert Papkin
James V. Dick
Squire, Sanders & Dempsey, LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(for TACA International)

Kathleen A Soled
Senior Vice President &
General Counsel
Trans World Airlines, Inc.
One City Centre 18th Floor
515 N. 6th Street
St. Louis, MO 63101

Jeffrey A. Manley
Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 2005
(for United Airlines)

Lawrence M. Nagin
General Counsel
US Airways, Inc.
Crystal Park Four
2345 Crystal Drive
Arlington, VA 22227

Rosalind A. Knapp
Deputy General Counsel
Office of the General Counsel
Department of Transportation
Nassif Building, Room 10428
400 7th Street, S.W.
Washington, D.C. 20590-0001

Samuel Podberesky, Esq.
Assistant General Counsel for
Aviation Enforcement and Proceedings
Department of Transportation
400 7th Street, S.W.
Room 4116
Washington, D.C. 20590